Bank Bumiputra Bhd v Malek & Joseph Au (a firm)

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22–38 OF 1991
ARIFIN ZAKARIA J
22 JULY 1995

Contract *— Collateral contract — Whether a collateral contract existed — Oral undertaking — Proof — Evidence Act 1950 s 92(b)*

Civil Procedure *— Summary judgment — Collateral contract — Whether triable issue raised on the ground of a collateral contract*

The plaintiff entered into a tenancy agreement with the defendant in July 1987. Under the agreement, the plaintiff leased out to the defendant the whole of the seventh floor of Bangunan Bank Bumiputra in Kuantan. The demised premises was rented out at a yearly rental of RM46,428 payable by monthly payment of RM3,869. The plaintiff claimed that the defendant had fallen into arrears of rental. The plaintiff applied for summary judgment for the arrears of rental, summary judgment for vacant possession having earlier been granted to the plaintiff. The principle ground of the defendant's case was that there was a collateral contract between the plaintiff and the defendant which existed side by side with the main contract. This collateral contract consisted of the oral undertaking given by the plaintiff's agent to the defendant to the effect that the defendant was free at any time to reduce the floor space as and when the need arose. The defendant relied solely on proviso (b) of s 92 of the Evidence Act 1950.

Held, allowing the plaintiff's application:

(1) The proviso was the equivalent of the English doctrine of collateral contract which was enacted into the Malaysian law of evidence.

(2) The defendant could rely on the oral undertaking or representation allegedly given by the agent of the plaintiff but the issue was one of proof.

(3) In the circumstances, the defendant should not be allowed to add to the express terms and conditions of the agreement based merely on the flimsy evidence that was put before the court. The defendant had not succeeded in raising any triable issue that ought to be set down for trial.

[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian penyewaan dengan defendan dalam Julai 1987. Di bawah perjanjian itu, plaintif telah menyewa keluar kepada defendan seluruh tingkat tujuh Bangunan

Bank Bumiputra di Kuantan. Premis yang disewa telah disewa keluar pada sewa tahunan sebanyak RM46,428 yang boleh dibayar melalui bayaran bulanan sebanyak RM3,869. Plaintif menuntut bahawa defendan kini telah menghadapi tunggakan bayaran sewa. Plaintif memohon untuk penghakiman terus untuk tunggakan sewa, penghakiman terus untuk milikan kosong terlebih dahulu telah diberikan kepad plaintif. Alasan utama kes defendan adalah terdapat satu kontrak kolateral di antara plaintif dan defendan yang wujud di samping kontrak utama. Kontrak kolateral ini terdiri daripada satu akujanji lisan yang diberikan oleh ejen plaintif kepada defendan yang membawa kesan bahawa defendan bebas pada sebarang masa mengurangkan kawasan yang disewa apabila keperluan timbul. Defendan bergantung cuma pada proviso (b) kepada s 92 Akta Keterangan 1950.

Diputuskan, membenarkan permohonan plaintif:

(1) Proviso itu adalah sama dengan doktrin Inggeris tentang kontrak kolateral yang telah diperundangkan ke dalam undang-undang keterangan Malaysia.

(2) Defendan boleh bergantung pada akujanji lisan atau representasi yang dikatakan telah diberikan oleh ejen plaintif tetapi isunya adalah tentang pembuktian.

(3) Dalam keadaan sedemikian, defendan tidak patut dibenarkan menambah kepada syarat-syarat nyata perjanjian itu berdasarkan semata-mata keterangan ringan yang dikemukakan di mahkamah. Defendan tidak berjaya menimbulkan sebarang isu yang patut dibicarakan yang harus ditetapkan untuk perbicaraan.]

Notes

For cases on applications for summary judgment, see 2 Mallal's Digest (4th Ed, 1994 Reissue) paras 3197–3520.

For a case on collateral contract, see 3 Mallal's Digest (4th Ed, 1994 Reissue) para 1350.

Cases referred to

Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray [1984] 1 Lloyd's Rep 23 (refd)

Eushun Properties Sdn Bhd v MBF Finance Bhd [1992] 2 MLJ 137 (refd)

Gek Lau Choon Theatrical Co v Hu Kiang Yan [1937] MLJ 25 (refd)

Tan Swee Hoe & Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Legislation referred to

Evidence Act 1950 s 92

Rules of the High Court 1980 O 14

Bastian Pius Vendargon (*Vendargon & Associates*) for the plaintiff.
Ibrahim Hussin Salleh (*Maydien & Associates*) for the defendant.

Arifin Zakaria J: This action was commenced as summons no 52–712–89 in the sessions court at Kuala Lumpur. It was transferred to this court by a consent order dated 7 January 1991. The plaintiff had by application dated 20 July 1989 applied for summary judgment against the defendant under O 26A r 1 of the Subordinate Court Rules 1980. The said application is now dealt with as an application under the equivalent O 14 of the Rules of the High Court 1980.

In this suit the plaintiff prays for:

(a) vacant possession;

(b) rental for the period from May 1989 to February 1989 amounting to RM63,414.50;

(c) double rental at the rate of RM3,869 per month from 8 March 1989 until date of actual delivery of vacant possession (27 January 1995); and

(d) costs.

This claim by the plaintiff arose out of the tenancy agreement dated 18 July 1987 ('the agreement') entered into between the plaintiff and the defendant. Under the agreement the plaintiff leased out to the defendant the whole of the 7th Floor, Bangunan Bank Bumiputra, Jalan Bank, PO Box 309, 25730 Kuantan, Pahang ('the demised premises'). The demised premises was rented out at a yearly rental of RM46,428 payable by monthly payment of RM3,869. The plaintiff claims that the defendant had fallen into arrears of rental and the plaintiff had by itself and by its solicitor demanded payment of the arrears of rental and given notice of the termination of the tenancy to the defendant, the last and final notice of termination being the letter dated 1 March 1989. The defendant failed to comply with the said demand of the plaintiff and hence this claim. The plaintiff then applied for summary judgment against the defendant. The order for vacant possession of the demised premises was granted by this court vide order dated 9 May 1994. The matters remaining to be determined by this court are with regard to prayers (b), (c) and (d).

In the affidavit of Kalthsom bte Dato' Haji Kosai, properties department manager of the plaintiff, affirmed on 30 June 1989, the plaintiff claims that due notice of the termination of agreement had been given to the defendant but the defendant in defiance of the same had failed to pay up the arrears of rental or deliver vacant possession. The defendant through the affidavit of Joseph Au Kong Weng affirmed on 25 September 1989, inter alia, states as follows:

> 4.3 Prior to the agreement dated above, the defendant by a letter dated 15 May 1986, a copy of which is annexed herewith and marked as exh 'A', commenced negotiations with the plaintiff for the rental of one-half of the 7th floor of the said premises. Soon thereafter, at the

suggestion of and in consideration of the representations of the plaintiff's assistant manager, that the defendant had the option of reducing the demised premises by one-half as and when the defendant deems it fit and necessary the defendant rented the whole of the 7th floor on the terms stated in the agreement.

4.5 I say that during the said negotiation, the plaintiff's assistant manager specifically represented to the defendant that the defendant could opt to reduce the demised premises by one-half at anytime thereafter when the defendant felt that the renting of the whole of the 7th floor was unjustified and uneconomical;

In short the defendant contends that acting on the representation by the plaintiff's assistant manager the defendant agreed to rent the whole of the 7th floor. In exercise of the said option the defendant wrote to the plaintiff and informed the plaintiff of its intention to reduce the renting of the demised premises by one-half effective from 1 April 1988. The plaintiff, he alleges, had, in breach of the said representation, refused to recognise the said option. The defendant further contends that by reason of the exercise of the option by the defendant the terms and conditions of the tenancy agreement was varied to the extent that as from 1 April 1988, the tenancy is only for one-half of the demised premises at a monthly rental of RM1,833.50 and the defendant had regularly rendered the said rental to the plaintiff. To augment its case further the defendant through the affidavit of Joseph Au Kong Weng affirmed on 11 September 1990 tendered what was alleged to be the telephone conversation ('teleconversation') between Joseph Au Kong Weng and one Leonard Boudville the then assistant manager of BBMB Properties Sdn Bhd which took place on 28 June 1988. The defendant contends that this teleconversation goes to prove the point that the defendant had agreed to take the whole floor on the promise made by Leonard Boudville that the defendant may, if need be, reduce the floor space. That so called promise, the defendant contends, had induced him to take up the whole of the seventh floor.

In reply to the defendant's affidavit of 28 September 1989, the plaintiff through the affidavit of Che' Lah bin Sulaiman affirmed on 23 June 1992 denies that there was either a contemporaneous representation from the plaintiff to the defendant or an agreement between the parties that the defendant could at his option take only half of the demised premises. The terms and conditions of the agreement between the plaintiff and the defendant, the plaintiff contends, had been reduced into writing and there is nothing more to it than what are contained in the agreement. The plaintiff in the same affidavit further contends that the defendant's letter dated 8 March 1988 to the plaintiff (exh B to defendant's affidavit in reply affirmed on 25 September 1989) would negative the defendant's own contention that there was an agreement between the parties to grant the defendant an option to reduce the floor space as and when necessary. On examination of this letter I agree with the plaintiff's contention that by the said letter the defendant was making a proposal to the plaintiff for a reduction in the floor space rented by the defendant for reasons stated in the letter. And in the said

letter the defendant sought the plaintiff's consent to the said proposal. The letter on its proper construction could not be regarded as an exercise of an option by the defendant.

The plaintiff through the affidavit of Mohd Jaafar bin Mohd Idris affirmed on 25 November 1994 further contends that the agreement between the two parties was reached after several exchanges of letters between the two parties. And contrary to what the defendant had alleged, the plaintiff claims that the proposal to rent the whole floor was made by the defendant as evident from the defendant's letter dated 23 July 1986 (exh E to plaintiff's further affidavit deposed to by Mohd Jaafar bin Mohd Idris affirmed on 25 November 1994). Paragraph 2 of the said letter reads:

> We write to inform you that our Dato' Abdul Malek bin Mohamed will be resuming his practice with our firm. As there are space constraints should we rent only one-half of your above building, we now write to inform you that we are desirous of renting the whole of 7th floor of the above premises.

Following the said letter, the plaintiff then made the offer for renting of the demised premises by the defendant. This offer is contained in the letter of 2 August 1986 (exh 'F' to plaintiff's affidavit affirmed on 25 November 1994). By letter dated 4 December 1986 (exh '9' to plaintiff's affidavit affirmed on 25 November 1994), the defendant accepted the plaintiff's offer. In its further affidavit in reply affirmed by Joseph Au Kong Weng on 6 January 1995, the defendant maintains that there was a contemporaneous oral agreement between the plaintiff and defendant that at any stage should the defendant wish to surrender one-half of the floor space the defendant would be entitled to do so.

From the several affidavits filed on behalf of the defendant, it appears that the principal ground of the defendant's case is that there was a collateral contract between the plaintiff and the defendant which existed side by side with the main contract. This collateral contract consists of the oral undertaking given by the plaintiff's agent Leonard Boudville to the defendant to the effect that the defendant is free at any time to reduce the floor space as and when the need arises.

The defendant claims that this undertaking by Leonard Boudville had induced the defendant to enter into the agreement with the plaintiff. Counsel for the defendant in his brief reply to the plaintiff's submission lucidly stated that the defendant is relying solely on proviso (b) of s 92 of the Evidence Act 1950. What s 92 provides is that as a general rule evidence of any oral agreement is not admissible as between the parties to contradict, vary add to or subtract from the terms of the written agreement unless the evidence sought to be introduced falls within one of the provisos to the said section. This is sometimes referred to as the parole evidence rule. Proviso (b) which the defendant seeks to rely on states that:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its

terms, may be proved, and in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document;

The proviso is the equivalent of the English doctrine of collateral contract which is enacted into our law of evidence. As was said by Mohd Yusoff SCJ in *Eushun Properties Sdn Bhd v MBF Finance Bhd* [1992] 2 MLJ 137, the law on collateral agreement is clearly spelt out in s 92 of the Evidence Act. In the case of *Tan Swee Hoe & Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, where the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of $14,000 as tea money. Two written agreements of tenancy were later executed by the parties but neither referred to the appellants' promise. A dispute arose between the parties and the appellants eventually sued for vacant possession. In their defence, the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished and so long as they paid the rent regularly. The trial judge dismissed the appellants' claim. The appellants appealed. Dismissing the appeal, Raja Azlan Shah CJ (as he then was) had this to say:

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. *Chitty on Contracts* (24th Ed) (para 674) put it this way:
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> > 'An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point.
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> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contract was made by Lord Moulton in *Heilbut Symons & Co Buckleton*: 'It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds", is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.' The case of *City and Westminster Properties (1934) Ltd v Mudd* and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarised it in *Dict Bentley Productions, Ltd v Harold Smith (Motors) Ltd*: 'Looking at the the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for

A a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.'

B *Chitty on Contracts* (27th Ed) Vol 1 at para 12-088 stated the principles governing collateral contract as thus:

Collateral contracts. Even though the parties intended to express the whole of their agreement in a particular document, extrinsic evidence may nevertheless be admitted to prove a contract or warranty collateral
C to that agreement. The reason is that 'The parol agreement neither alters nor adds to the written one, but is an independent agreement.' Such evidence is certainly admissible in respect of a matter on which the written contract is silent. In a number of older cases it was stated that evidence of such a contract or warranty must not contradict the express terms of the written contract. However, more recently, the courts have
D admitted evidence to prove an overriding oral warranty or to prove an oral promise that the written contract will not be enforced in accordance with its terms. Thus in *City of Westminster Properties (1934) Ltd v Mudd* the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not as sleeping quarters. The tenant objected to this covenant, and the landlords gave
E him an oral assurance that, if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlords sought to forfeit the lease for breach of this covenant. Harman J held that the oral assurance constituted a separate collateral contract from which the landlords would not be permitted to resile. The collateral contract or warranty may be oral or informal even though the main contract is one
F which is required by law to be in or evidenced by writing.

On the above authorities, I am left with no doubt that the defendant could rely on the oral undertaking or representation allegedly given by Leonard Boudville on behalf of the plaintiff. But the issue is one of proof. On proof of the separate oral agreement, McElwaine CJ said in
G *Gek Lau Choon Theatrical Co v Hu Kiang Yan* [1937] MLJ 25 at p 26:

This proviso sets out what I understand to be the English law as laid down in such cases as *Lindley v Lacey* 17 CB (NS) 578, *Morgan v Griffith* LR 8 Ex 70, *Angell v Duke* LR 10 QB 174.

Conversations leading up to the making of a contract are not presumed
H themselves to form a collateral contract. As Lord Haldane said in *Heilbut, Symons & Co v Buckleton* [1913] AC at p 37: 'It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it. My Lords, words which on the face of them appear to be simply representations of fact may, if the contract so requires, import a contract of warranty.' And
I Lord Moulton at p 47: 'It is evident, both on principle and on authority, that there may be a contract the consideration of which is the making of some other contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an 'animus contrahendi' on the part of all the parties to them must be clearly shewn.'

In the present case the only evidence that was put forward by the defendant to support its claim is that there was such a collateral contract is the teleconversation between himself and Leonard Bourdville the transcript of which is contained in his affidavit affirmed on 6 January 1995. On close scrutiny of the transcript, I could not find anything intimating that the agent for the plaintiff, Leonard Boudville, had at any time agreed with the defendant that the defendant be given the option to reduce the floor area as and when required. Even assuming for a moment there exists such an intention by the parties, then the next question is what are the terms agreed to between the parties. On question of rental for example, I do not think it can properly be assumed that in the event the floor area is reduced by half then the rental would be reduced by half. On the contrary the defendant's own letter dated 23 July 1986 to the plaintiff (exh E to further affidavit of Mohd Jaafar bin Mohd Idris affirmed on 25 November 1994) indicated that the reason that prompted the defendant to take the whole floor was because the defendant's partner Dato' Abdul Malek will be resuming his practice. All the letters were silent on the question of the defendant's right of option to reduce the floor space as claimed by the defendant.

Furthermore, if the option is so important to the defendant as the defendant now claims, I could not see any plausible reason why it could not be incorporated into the agreement. The defendant being a firm of solicitors ought to be presumed to have acted on legal advice in entering into the agreement with the plaintiff. In the circumstances of this case, I am of the view that the defendant should not be allowed to add to the express terms and conditions of the agreement base merely on the flimsy evidence that was put before the court.

For the above reasons I find that the defendant has not succeeded in raising any triable issue that ought to be set down for trial. In this respect I would adopt the words of Ackner LJ in *Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21 where he said at p 23:

> It is trite law that O 14 proceedings are only decided by weighing the two affidavits. It is also trite law the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, give leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence.

Applying the above test to the defence raised by the defendant, I come to the conclusion the defendant failed to raise any real or bona fide defence to the plaintiff's claim. I, therefore, allow the plaintiff's application for an order that summary judgment be entered against the defendant as prayed in paras 10(b), (c) and (d) of the statement of claim.

Application allowed.

Reported by Raymond Leung